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Nos. 202 and 203

In the Supreme Court of the United States

OCTOBER TERM, 1958

BEL OIL CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

UNION OIL COMPANY OF CALIFORNIA AND LOUISIANA LAND AND EXPLORATION COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
SAMUEL D. SLADE,
PETER H. SCHIFF,
Attorneys,
Department of Justice, Washington 25, D. C.

WILLARD W. GATCHELL,
General Counsel,
HOWARD E. WAHRENBROCK,
Solicitor,
WILLIAM W. ROSS,
Attorney,
Federal Power Commission,
Washington 25, D. C.

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OPINION BELOW

The orders of the Federal Power Commission (R. 554–579, 586–600) are reported at 16 F. P. C. 100 and 17 F. P. C. 89. The opinion of the Court of Appeals (Pet. App. 1a–11a) is reported at 255 F. 2d 548.

JURISDICTION

The judgment of the Court of Appeals was entered on April 23, 1958 (Pet. App. 12a). The petitions for writs of certiorari were filed on July 22, 1958. The

jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717r (b).

QUESTIONS PRESENTED

1. Whether Section 4 of the Natural Gas Act, requiring gas rate changes to be filed with the Federal Power Commission and providing for Commission suspension and review of such rate changes, is applicable to rate increases of independent producers of natural gas where the increases are provided for in a gas sale contract.

2. Whether the Federal Power Commission may lawfully require independent producers of natural gas to submit cost evidence as a starting point in establishing the reasonableness of their increased gas rates under the Natural Gas Act.

STATUTE INVOLVED

The applicable provisions of the Natural Gas Act are set forth in petitioner Union Oil Company's appendix at pp. 12a–16a.

STATEMENT

Petitioners are independent producers of natural gas which sell to Transcontinental Gas Pipe Line Company (Transco) under two separate contracts entered for a term of twenty years, providing for periodic fixed-price increases (R. 242–246, 248–282). They challenge a decision of the court below upholding the substantive validity of a single order of the Federal Power Commission entered in consolidated proceedings on rate increases filed by petitioners. The pertinent facts may be briefly summarized as follows:

1. *The Union-Transco contract (No. 203)*:—The sales contract between the petitioners in No. 203, Union Oil Company and Louisiana Land and Exploration Company, on the one hand, and Transco, on the other hand, was entered into in May, 1948. On June 7, 1954, the date of this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, holding independent producers subject to regulation under the Natural Gas Act, petitioners' price under the Union-Transco contract (as amended) stood at 8.8¢ per Mcf, exclusive of taxes (R. 286). In November, 1953, prior to the *Phillips* decision, petitioners had amended the Transco sale rate to provide for a price increase from 8.8¢ per Mcf to 16¢ per Mcf. This increase, however, was to be effective only after October 31, 1954 (R. 295, 314, 323).

The regulations issued by the Commission following *Phillips* (18 C. F. R. 154.91, *et seq.*) required the producers to file as rate schedules, pursuant to Section 4 of the Natural Gas Act, their sales contracts and rates in effect on June 7, 1954, the date of the *Phillips* decision. The regulations (18 C. F. R. 154.94(e)) provided that any increase in rates after that date, whether by subsequent agreement or as a result of "favored nation" or fixed-price escalation in prior contracts, would constitute a rate change which must be filed under Section 4 (d) of the Act, and be subject to suspension and review under Section 4 (e). See *Magnolia Petroleum Co.* v. *Federal Power Commission*, 236 F. 2d 785 (C. A. 5), certiorari denied, 352 U. S. 968.

Petitioners, pursuant to these regulations, filed (in September, 1954) the Union-Transco contract, as amended, as their Gas Rate Schedule No. 1, showing 8.8¢ per Mcf as the effective June 7, 1954 rate (R. 248, 294). Simultaneously, they filed as their Gas Rate Schedule No. 2 the 1953 amendment purposing an increase from 8.8¢ per Mcf to 16¢ per Mcf, to be effective after October 31, 1954 (R. 314, 323). The Commission, in October, 1954, accepted for filing the 8.8¢ per Mcf rate (Schedule No. 1) without suspension, as a compliance or "initial" rate, and set for hearing and suspended, pursuant to Section 4 (e) of the Natural Gas Act, the increase to 16¢ per Mcf (Schedule No. 2), as a rate change occurring subsequent to June 7, 1954 (R. 389–391). The 16¢ rate was placed in effect subject to refund at the end of the suspension period on February 1, 1955 (R. 490).

2. *The Bel Oil-Transco contract (No. 202)*:—The contract between petitioner Bel Oil Corporation, and Transco, which was executed in May, 1954, provided for a price of 8.8¢ per Mcf up to October 31, 1954 and 16¢ per Mcf thereafter (R. 242–247). Following the *Phillips* decision, Bel Oil filed (in September, 1954) this contract as its Gas Rate Schedule No. 3, showing an effective rate of 8.8¢ per Mcf on June 7, 1954 (R. 247). Subsequently, on October 4, 1954, Bel Oil filed, as Supplement No. 1 to its Gas Rate Schedule No. 3, notice of the rate increase from 8.8¢ per Mcf to 16¢ per Mcf which it proposed to make effective on November 3, 1954 (R. 247–248). The Commission accepted without suspension the 8.8¢ rate (Schedule No. 1) as a compliance or "initial" rate, and set

for hearing and suspended the rate increase (Supplement No. 1) (R. 366–367). The Bel Oil rate increase was placed in effect subject to refund on February 1, 1955 (R. 490).

3. *Proceedings before the Commission.*—The two rate increase proceedings here involved were consolidated for hearing before a trial examiner, beginning in September, 1955. At this hearing, the petitioners relied exclusively on evidence that the Transco contract was the result of arm's-length bargaining and that the 16¢ rate increase was no greater than other prices in the area (R. 502–512). When petitioners had completed their presentation, the Commission staff and various intervenors moved to dismiss the rate increase applications on the ground that petitioners had not sustained the burden of establishing the reasonableness of the higher rate by sufficient evidence including a showing of cost-of-service (R. 76–78). In passing upon this motion, the Commission held that the evidence offered by petitioners was inadequate to establish the reasonableness of the 16¢ per Mcf rate, but remanded for further hearing to provide petitioners with an additional opportunity to justify the increase (R. 474, 476). At the second hearing in December, 1955, petitioners made no effort to supply cost evidence, but merely elaborated their earlier presentation (R. 518–519). A second motion to dismiss was referred to the Commission which deferred its ruling until the conclusion of the proceeding and remanded for a second time to the hearing examiner (R. 480–481). In the third hearing, petitioners de-

clined to proceed further and the issue was submitted on the motion to dismiss (R. 148).

The trial examiner recommended that the applications be dismissed on the ground that evidence of arm's-length bargaining and field price was insufficient alone to establish the justness and reasonableness of the 16¢ rate (R. 534–543). The Commission affirmed the examiner's order (R. 568–574). It held that the evidence presented by petitioners was insufficient to meet statutory and constitutional standards of justness and reasonableness, citing and relying upon decisions of this Court as well as *City of Detroit, Michigan* v. *Federal Power Commission*, 230 F. 2d 810 (C. A. D. C.), certiorari denied, 352 U. S. 829. Petitioners' applications for rehearing were denied (R. 586–600).

4. *Proceedings before the Court of Appeals.*— When the petitioners sought review of the Commissioner's order in the Fifth Circuit, that court, while rejecting all of petitioners' substantive contentions, vacated the Commission's order and remanded with instructions to provide petitioners with a fourth opportunity to submit cost evidence (Pet. App. 1a–11a).[1]

The court held that "evidence of unregulated prices in the field is not sufficient to warrant a finding by the Commission that a price comparable to them is just and reasonable within the intendment of the Natural Gas Act" (Pet. App. 8a), and that (Pet. App. 10a) "even though the increases here in issue had been predetermined by contract before the Supreme Court's decision of the *Phillips* case, and thus before the ent-

[1] Citations to the opinion below refer to the appendices of both of the petitions in Nos. 202 and 203.

off date of June 7, 1954, they are 'rate changes' subject to Section 4 (d) of the Act and not an initial rate subject to changes under Section 5 (a) of the Act".

ARGUMENT

1. Petitioners advance essentially the same arguments raised by the petition in *Sun Oil Company* v. *Federal Power Commission*, No. 167, this Term, seeking review of a decision of the court below on a record parallel to the present one. Their contentions are that the Federal Power Commission could not set for hearing and suspend a rate increase provided by a gas sale contract, and could not lawfully require cost evidence as a starting point in passing upon the rates of independent natural gas producers. For the reasons stated at pp. 6–13 of our brief in opposition in *Sun Oil*, to which we respectfully refer the Court, it is submitted that there is no merit to either contention and no occasion for further review by this Court.

2. Petitioners Union Oil Company and Louisiana Land and Exploration Company make certain additional arguments requiring a brief response.

(*a*) These petitioners argue (Pet. 12–15) that the increase from 8.8¢ per Mcf to 16¢ per Mcf in the rate governing their sales to Transco was not suspendible under Section 4 (e) of the Natural Gas Act because it was incident to a new contract negotiated in 1953, rather than a revision of an existing contract. The original Union-Transco contract, entered into in 1948 for a term of twenty years, was superseded in 1953 by a new agreement, which was not to become effective until November, 1954. While this

agreement changed certain terms and conditions of the prior contract, it continued the original service to Transco from the same field (the White Lake Field), as modified and reduced in scope by the new contract terms (compare R. 249, 253, 265 with R. 296, 298, 313). It was this continuing "sale" or "service" to Transco which the Commission was required to certificate and regulate following the decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672; and its jurisdiction attached to this sale, rather than to the terms of a particular contract.[2] Petitioners could not have abandoned the sale or service without the consent of the Commission pursuant to Section 7 (b) of the Gas Act (15 U. S. C. 717f (b)). *J. M. Huber Corp.* v. *Federal Power Commission*, 236 F. 2d 550 (C. A. 3), certiorari denied, 352 U. S. 971. Since petitioners could not have instituted a new service to Transco without, at a minimum, abandonment of the old service and certification of such new service, the price increase must have constituted a change in an existing service. Section 4 (d) of the Act states that *any* change in an existing "rate, charge, classification, or service, or in any rule, regulations, or contract

[2] On September 30, 1955, Union Oil and Louisiana Land applied under protest for certificates of convenience and necessity authorizing *inter alia* their sale to Transco, the applications listing both the original 1948 contract and the 1953 revision. On October 13, 1955, the Commission, after a hearing in Docket No. G-3711, certificated petitioners' sale to Transco pursuant to Section 7 (c) of the Act. The certificate order referred to the Transco sale rather than a particular contract, and the order applied to sales made under both the 1948 and 1953 contracts.

relating thereto" is subject to hearing and suspension under Section 4 (e). Regardless therefore of whether the 16¢ rate was embodied in a new contract effective after June 7, 1954, it was subject to the Commission's Section 4 powers, since it constituted a change in an existing "rate" or "contract".

Accordingly, the court below concluded correctly that the negotiated price rise from 8.8¢ per Mcf to 16¢ per Mcf in the revised agreement was a rate change subject to the hearing and suspension requirements of Section 4 (e) of the Act.

Moreover, no other result would be consistent with the rate review procedures contemplated by Congress. Since it would usually be possible for a seller to negotiate some change in the terms and conditions governing a continuing gas sale, petitioners' contention that this alone would give rise to an "initial rate" (not subject to suspension) would open the way to evasion of the policy of retroactive rate regulation embodied in Section 4 of the Act, with consequent loss to the consumer.[3]

(*b*) Petitioners Union Oil and Louisiana Land also argue (Pet. 19–20) that the Commission acted inconsistently and arbitrarily in requiring them to submit evidence of costs to justify a rate increase, while

[3] Petitioners Union Oil and Louisiana Land also argue (Pet. 15–18) that the Commission applied a purportedly overbroad provision of the original Order No. 174A to their rate increase. This contention seems to be a make-weight, since, if the conclusions in the text above are correct, petitioners' 7¢ increase was suspendible under Section 4 of the Act and the Commission's existing regulations, regardless of the scope of Order No. 174A, as originally promulgated.

relaxing this requirement in the case of certain other producers in a proceeding based on a distinct and unrelated record. The court below rightly rejected this contention, pointing out (Pet. App. 8a) that, regardless of the circumstances in other proceedings, on the record here involved "the Commission did not have sufficient evidence before it to approve these rates as just and reasonable."

CONCLUSION

For these reasons, and for the reasons stated in our brief in opposition in *Sun Oil Co. v. Federal Power Commission*, No. 167, this Term, the petitions for writs of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLADE,
PETER H. SCHIFF,
Attorneys.

WILLARD W. GATCHELL,
General Counsel,

HOWARD E. WAHRENBROCK,
Solicitor,

WILLIAM W. ROSS,
Attorney,
Federal Power Commission.

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